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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Our File No.
0484-101-63

January 26, 1993

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
Washington, D.C. 20554

Reference: Heartland Communications, Inc.
MM Docket No. 92-233
RM-8078

Dear Ms. Searcy:

Submitted herewith on behalf of Heartland Communications, Inc.,
are an original and four copies of its "Reply to Comments in Opposition to
Counter-Proposal" in the above referenced proceeding.

If there are any questions in regard to this matter, please
communicate directly with this office.

Respectfully submitted,

HEARTLAND COMMUNICATIONS,
INC.

By *Dawn M. Sciarrino*
Dawn M. Sciarrino
Its Attorney

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Before The

Federal Communications Commission

Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In The Matter Of)
)
Amendment of Section 202(b) of) MM Docket No. 92-233
Table of Allotments.) RM-8078
FM Broadcast Stations.)
(Campbellsville and Mannsville,)
Kentucky).)

To: Chief, Allocations Branch

**Reply to Comments
in Opposition to Counter-Proposal**

Heartland Communications, Inc. ("Heartland"), by its attorneys hereby submits its Reply to the Comments filed on January 12, 1993, by Patricia Rogers ("Rogers")¹ in opposition to the counter-proposal filed by Heartland on December 28, 1992, in connection with the above-captioned Notice of Proposed Rulemaking ("NPRM").² In support thereof, the following is stated:

1. Rogers proposes to substitute Channel 260C3 for Channel 260A at Campbellsville, and reallocate Channel 260C3 to Mannsville, Kentucky, permitting an upgrade of her authorized but

¹ Rogers is the permittee of Station WVLC(FM), Channel 260A, Campbellsville, Kentucky.

² DA 92-1324, released November 5, 1992. Heartland files this reply in order to be afforded fair opportunity to respond to Rogers's comments on Heartland's counterproposal. To the extent that the Commission may deem appropriate a request for leave to file this reply, Heartland respectfully requests such leave. Good cause exists because the issues that Rogers has joined in her comments are significant questions arising under Section 307(b) of the Communications Act of 1934, as amended.

unbuilt facilities. Heartland proposes that the Commission instead employ Channel 260A to deliver two new transmission services, at Dunnville, Kentucky, and at Brownsville, Kentucky. In advancing her cause, Rogers wants to have her cake and eat it too: when she petitioned to abandon Campbellsville to upgrade her facility at Mannsville, her position was that Campbellsville is adequately served by the existing services, which are licensed to Heartland.³ In response to Heartland's counter-proposal, however, Rogers claims that Heartland is a monopolist trying to prevent competition in the Campbellsville market.⁴ On the contrary, however, Heartland simply proposes a more efficient allocation scheme so that it may apply for Channel 260A and bring first transmission service to Brownsville, while allowing Rogers to provide first transmission service to Dunnville.⁵

2. Rogers claims that Heartland did not contradict her evidence that Mannsville is a community for allocation purposes.⁶ Her claim is flawed. First, the burden is not upon Heartland to prove that Mannsville is *not* a community for Section 307(b) purposes; the burden is upon Rogers to demonstrate that it *is* a community. Heartland believes that Mannsville fails the test. Second, and regardless, the fair and

³ See NPRM at ¶ 3.

⁴ Rogers's Reply Comments, p. 2. The Commission's records reflect that Heartland did not oppose or otherwise comment upon the initial proposal to allot Channel 260A to Campbellsville.

⁵ Heartland Counterproposal, p. 3.

⁶ Rogers's Reply Comments, pp.3-4.

efficient use of the spectrum dictates that Heartland's proposal to provide first transmission service to both Dunnville and Brownsville is to be preferred over Rogers's proposal for upgraded facilities at Mannsville. If Rogers is unwilling to serve Campbellsville with her authorized facilities, then Section 307(b) of the Communications Act requires analysis of the proposal for its efficiency and practicality. Under that analysis Heartland's counter-proposal is to be preferred.

3. Rogers also erroneously claims that Heartland's counter-proposal is not permissible under Commission policy because her Campbellsville construction permit must be protected.⁷ The ruling cited by Rogers, *Letter to Jerrold Miller, Esquire* (September 6, 1989), is inapposite. In that case an existing construction permit was protected from a third-party's short-spaced petition for rulemaking. The entity holding the affected construction permit was not the party who initiated the rulemaking or who proposed the short-spaced allocation in the first place. Rogers initiated the instant rulemaking seeking to move both her community of license and transmitter site. Her own petition for rulemaking is short-spaced to her existing construction permit. Thus, by initiating the rulemaking Rogers has opened the door for counterproposals which are properly considered in the context of the rulemaking—even without protection to Rogers's abandoned Campbellsville construction permit.⁸

⁷ Rogers's Reply Comments, pp. 4.

⁸ See NPRM, p.2, Appendix, #3(c).

4. Rogers asserts that *Miller* stands for the proposition that she may not be required to change her transmitter site or community of license without her permission. Neither *Miller* nor the case cited therein, *Waupun, Mayville, and New Holstein, Wisconsin*, 3 FCC Rcd 3163 (1988), deals with a change of community of license. The cited cases deal solely with the forced movement of a transmitter site, and the relocation of the facilities of an existing station. Rogers has neither an existing facility nor a transmitter site. Moreover, by initiating this rulemaking proceeding, Rogers submitted to the discretion and authority of the Commission to consider proposals that are counter to or mutually exclusive with her proposal.⁹

5. The Commission can and will require a permittee or licensee to relocate where the substitution of channels and/or relocation of a transmitter will permit a more efficient and fair allocation of broadcast frequencies.¹⁰ Even where the party being required to relocate opposes such a move, the Commission may require relocation upon a compelling showing that the public gains achievable are sufficient to overcome concern with the ensuing impact upon the affected station and the public.¹¹ A petition for rulemaking to change community of license is an extraordinary undertaking. Section 307(b) is clearly implicated where a party seeks to serve a different community, and communities will either

⁹ *Id.*

¹⁰ *North Charleston, Eastover, and Ravenel, South Carolina*, 51 RR2d 25, 33 (1982).

¹¹ *Ashville, North Carolina*, 36 RR2d 810, 815 (1976). Here, of course, there is no impact upon the affected station, since Rogers's facility is unbuilt.

gain or lose service as a result of the rulemaking. The fair and efficient distribution of broadcast frequencies requires an analysis under Section 307(b) and, like the less extraordinary undertaking in the case of relocation of a transmitter site, can ordain the reallocation of a permit or license to a new community of license.

6. Rogers offers Channel 227A as a possible substitute allotment at Brownsville, where Heartland proposes the allotment of Channel 260A. She recognizes, however, that such a substitute is only a conditional possibility, contingent upon the outcome of a pending proceeding in MM Docket 90-535. It is well settled that the Commission will not make allotments on a conditional basis, and therefore, the potential for a Channel 227A allotment is nonexistent.

7. If the conditional possibility of a Channel 227A allotment at Brownsville is the only alternative that Rogers's engineering analysis reveals, it is all the more emphatic a reason to adopt Heartland's proposal. It can only mean that the adoption of Rogers's proposal would preclude any new first service at Brownsville. Heartland has shown the demonstrable need and desirability of a first transmission at Brownsville; to deprive the community of its only practical potential for first service would run entirely counter to the prescription of Section 307(b).¹²

8. As demonstrated in Heartland's counter-proposal, the allocation of Channel 260A to Dunnville and Brownsville—providing first

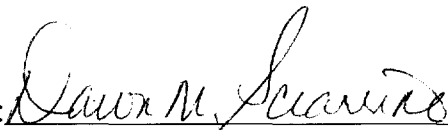
¹² Even if Channel 227A were to become available at Brownsville, by Rogers's own evidence a Mannsville Class C3 allotment on Channel 260 would forever preclude a second transmission service at Brownsville.

transmission service to two separate communities—is a cogently fairer, more efficient use of broadcast spectrum under Section 307(b). Such an allocation is clearly to be preferred over Rogers's proposal.

WHEREFORE, the premises considered, Heartland Communications, Inc. respectfully requests that the Commission decline to amend the Table of Allotments to allot Channel 260C3 to Mannsville, Kentucky, and that it instead amend the Table of Allotments to allot Channel 260A to Dunnville and Brownsville, Kentucky, as proposed by Heartland.

Respectfully submitted,

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By: 

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January 26, 1993

CERTIFICATE OF SERVICE

I, Dinah L. Hood, a secretary in the law firm of Haley, Bader & Potts, hereby certify that a copy of the foregoing "Reply to Comments in Opposition to Counter-Proposal" was mailed, this 26th day of January, 1993 to the following:

* Mr. Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau
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Dinah L. Hood

* HAND DELIVERED